No. 92-551

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HENRY G. CISNEROS, Secretary Of The United States Department of Housing And Urban Development, *et al.*,
Petitioners,

v.

ALPINE RIDGE GROUP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CHARTER FEDERAL SAVINGS BANK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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MISCELLANEOUS

Supreme Court Rule 37.3 1

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BRIEF OF CHARTER FEDERAL SAVINGS BANK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.3, this brief *amicus curiae* is filed with the written consent of all parties. The written consent of the Petitioner United States Department of Housing and Urban Development ("HUD") and both counsels of record for Respondents Alpine Ridge Group *et al.* ("Alpine Ridge") have been filed with the Clerk of this Court.

INTEREST OF THE *AMICUS CURIAE*

1. Charter Federal Savings Bank ("Charter") is an $800 million federal savings bank with offices throughout the 250 mile corridor between Knoxville, Tennessee and Roanoke, Virginia.

2. Charter has a significant interest in this case because it, like the respondents in this case, brought suit against a government agency seeking, *inter alia*, a remedy for Congress' repudiation of certain government contractual obligations. In both cases the government claims a right to amend or abrogate, with impunity, bargained-for financial agreements to which it is a party, and from which it has received valuable consideration. Charter currently has before this Court a petition for certiorari, which raises many of the same issues as the instant case. *See Charter Federal Sav. Bank v. Director, Office of Thrift Supervision*, 976 F.2d 203 (4th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3511 (U.S. Jan. 4, 1993) (No. 92-1142).

3. Because the Fourth Circuit in *Charter Federal* relied principally on *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), and its "unmistakability doctrine" for its holding, Charter's interest in this case properly is confined to the Ninth Circuit's interpretation and application of *Bowen* to contracts to which the government is a party.

SUMMARY OF ARGUMENT

1. The question before this Court is whether a sovereign can repudiate with impunity a contract to which it is a party, and from which the sovereign has received valuable consideration. Misconstruing language in this Court's *Bowen* decision, HUD urges an affirmative answer to this question. Properly construed, however, the "unmistakability doctrine" as enunciated in *Bowen* has no application in the instant case. As such, the Ninth Circuit properly rejected the government's proposed application of *Bowen* to the facts of this case.

Essential to this conclusion are the factual dissimilarities between this case and *Bowen*. First, the *Alpine Ridge* contracts were bargained-for deals supported by independent consideration. Second, the respondents here do not challenge Congress' power to amend the legislation in the exercise of "public and general acts of a sovereign." Third, respondents' contracts do not incorporate statutory language granting the government the right to amend or repudiate the contracted-for rights. In short, the factual underpinnings of *Bowen* distinguish it from *Alpine Ridge* and render its holding and logic wholly inapposite to the facts of this case.

2. An adoption of the government's proposed application of *Bowen* would lead to the absurd result of rendering all contracts with the government illusory and unenforceable.

3. The government argues that if the respondents have vested contract rights, section 801 does not constitutionally impair those rights because the legislation has a rational basis. This Court, however, has never adopted a "rational basis" test to review allegations of government breaches of its *own* contracts. To the contrary, this Court has suggested that a more rigorous standard is appropriate.

ARGUMENT

CONGRESS' ABROGATION OF ITS CONTRACTUAL OBLIGATIONS VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

While Charter embraces the Ninth Circuit's repeated finding that HUD entered into contracts with the respondents whereby HUD agreed to use a "formula method" to calculate yearly rental adjustments, *see Alpine Ridge Group v. Kemp*, 955 F.2d 1382 (9th Cir. 1992); *Rainier View Associates v. United States Department of Housing and Urban Development*, 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), Charter confines its discussion below to the narrow but important issue of whether *Bowen* and related principles shield the government from liability resulting from its decision to repudiate certain of its contractual obligations.

I. THE NINTH CIRCUIT PROPERLY REJECTED THE PETITIONER'S ASSERTION THAT *BOWEN* PERMITS THE GOVERNMENT TO REPUDIATE, WITH IMPUNITY, CONTRACTS TO WHICH IT IS A PARTY

In the court of appeals, HUD relied primarily on *Bowen* to argue that the respondents' contract rights were not "vested." Specifically, the agency asserted that Congress "can radically change statutory language underlying a government contract, *thereby changing the contract itself*." Brief for Appellants at 39 (filed in the court of appeals on May 9, 1991) (emphasis supplied); *see also Alpine Ridge*, 955 F.2d at 1385. The Ninth Circuit properly rejected this novel interpretation of *Bowen*.

A. The Factual Underpinnings Of *Bowen* Distinguish It From *Alpine Ridge* And Render Its Holding Wholly Inapposite To The Facts Of This Case

In *Bowen*, this Court held that Congress' decision to amend § 418 of the Social Security Act, and thereby eliminate a State's right to terminate agreements with the

Secretary of Health and Human Services, did not effect a taking of property in violation of the Fifth Amendment. *Bowen*, 477 U.S. at 54-56.

The instant case, however, is starkly different than both the letter and spirit of *Bowen*. First, where *Bowen* involved a party's challenge of Congress' power to amend a statute, *Alpine Ridge* does not. *See Alpine Ridge*, 955 F.2d at 1385 (citation omitted) ("Here, the owners do not challenge Congress's power to amend the terms of the underlying legislation in the exercise of 'public and general acts of a sovereign'.").

Second, this Court expressly found that the termination clause in the § 418 Agreement was *not*:

> a term over which the State had any bargaining power or for which the State provided independent consideration. Rather, the provision simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare.

Bowen, 477 U.S. at 55. The § 418 agreement, therefore, did not rise to a property interest protected by the Fifth Amendment. *Alpine Ridge*, in contrast, involves a bargained-for contractual right paid for with valuable consideration. *Alpine Ridge*, 955 F.2d at 1385 ("[The owners] assert that their contract rights are supported by independent consideration and are therefore vested under the Supreme Court's decisions in *Lynch* . . . and *Perry* . . . ."); *see also Acacia Villa v. Kemp*, 774 F. Supp. 1240, 1248 (C.D.Cal. 1990) ("[*Alpine Ridge*] falls into the category of cases that the *Bowen* court was careful to distinguish. . . . The [respondents'] contracts are not gratuities; rather, they are bargained-for agreements, for which [respondents] paid valuable consideration. . . .").[1]

[1] For example, where the government in *Bowen* received nothing in return for the § 418 Agreement, *see Bowen*, 477 U.S. at 55 ("The termination clause was not . . . a term . . . for which the State

Third, unlike the statutory and contractual framework of this case, the *Bowen* Court confined its holding to agreements that *reference* and *incorporate* statutory language, like that found in the Social Security Act, that explicitly reserves to Congress "[t]he right to alter, amend, or repeal any provision of the Act." *Bowen*, 477 U.S. at 51-52 (citations omitted) (internal quotation marks omitted). In *Bowen*, both the contract and the statute mandated that the § 418 agreements track the terms of the legislation. Specifically, the *contract* required that "its terms [be] '*in conformity with*' § 418," 477 U.S. at 54 (emphasis supplied), while the *statute* required that agreements made thereunder be "*not inconsistent with* the provisions of this section." *Id.* at 54 n.19 (citing 42 U.S.C. § 418(a)(1)) (emphasis supplied). Because the § 418 contract language, and the statutory language, put the contracting party "on notice that the terms of its Agreement must mirror the provisions" of § 418, *id.*, including the language of reservation, this Court concluded that the agreement "simply cannot be viewed as conferring any sort of 'vested right' . . . ." *Id.* at 55.

In contrast to the Social Security Act, § 801 of the Department of Housing and Urban Development Act of 1989, Pub. L. No. 101-235. 103 Stat. 1987 (1989), contains *no* explicit reservation language, and *no* language requiring that contracts made pursuant to the statute be "not inconsistent" with § 1437f. Nor do the contracts in question require that the terms be "in conformity" with the statutory language. In short, none of the underlying facts supporting the *Bowen* rational is present here.

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provided independent consideration"), the government in this case received substantial benefits including housing construction, development, and leasing to low income tenants.

B. Adoption Of The Petitioner's Application Of *Bowen* Would Render All Contracts With The Government Illusory

An application of *Bowen* that permits the government to alter or repudiate its contractual obligations with impunity would render *every* government contract illusory and unenforceable. The Supreme Court, however, echoing the words of Alexander Hamilton, long ago made clear that "[i]t is against the rules, both of law and reason, to admit by implication in the construction of a contract a principle which goes in destruction of it." *Murray v. Charleston*, 96 U.S. 432, 445 (1877). *See also Walsh v. Schlecht*, 429 U.S. 401, 408 (1977). Indeed, the sort of *Bowen* application urged by the agency here, *i.e.*, that the government can repudiate its contractual obligations with impunity, has already been rejected by this Court, which characterized the contract construction "as an absurdity." *See Murray*, 96 U.S. at 445 ("A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.").[2]

II. HUD'S PLEA FOR THIS COURT TO UTILIZE THE "ARBITRARY AND IRRATIONAL" STANDARD WHEN REVIEWING LEGISLATION THAT REPUDIATES GOVERNMENT CONTRACTUAL OBLIGATIONS SHOULD BE REJECTED

The government argues that if the respondents have vested contract rights, § 801 does not constitutionally impair those rights because the congressional action in question was neither "arbitrary" nor "irrational." Brief of Petitioner at 35. In urging this Court to adopt this

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[2] If HUD's application of *Bowen* were adopted, future parties to a contract with the government would no doubt insist on a contract clause that absurdly states in substance the following: "The United States promises not to break the promises contained in this agreement." The irony, of course, is that under general contract principles, parties could, with certain exceptions, breach even this contract clause so long as they provide the other party with an adequate remedy.

minimal standard, HUD relies upon, *inter alia*, *National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry.*, 470 U.S. 451, 472 (1985). In *National R.R.*, however, this Court expressly noted that the United States was not a party to the agreement, a distinction ignored by the government here:

> Because, as we have demonstrated, *neither the Act nor the Basic Agreements created a contract between railroads and the United States*, our focus shifts from a case in which we confront an alleged impairment, by the Government, of its own contractual obligations, to one in which we face an alleged legislative impairment of a private contractual right. *We therefore have no need to consider whether an allegation of a governmental breach of its own contract warrants application of the more rigorous standard of review that the railroads urge us to apply.*

470 U.S. at 471 (emphasis supplied). Without settling upon a specific standard when reviewing alleged government breaches of its own contracts, this Court strongly suggested that a heightened standard would be appropriate:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements. . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledger. This Court has given no sanction to such a conception of the obligations of our Government.

Id. at 471 and n.24 (citing *Perry v. United States*, 294 U.S. 330 (1935)). *See also id.* at 472 (emphasis supplied) ("When the contract is a *private* one, . . . the judicial scrutiny [is] quite minimal.").

To give substance to this Court's admonition in *National R.R.* and *Perry* that a government contract is more than a "vain promise, a pledge having no other sanction than the pleasure and convenience of the pledger," Charter submits that a heightened standard of review is appropriate when assessing government breaches of its own contracts. Indeed, adoption of HUD's proffered "rational review" standard would permit abrogation of contracts simply to save money, a plainly "rational" basis but one expressly rejected in *Lynch v. United States*, 292 U.S. 571 (1934), and *Perry*, 294 U.S. 330. Moreover, the standard would eviscerate the sanctity of contracts, and reduce government contracts to nothing more than illusory and unenforceable promises. *See* Part I.B., *supra*.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Respondents' Brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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